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No. 06-1011

Supreme Court, U.S.
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In The
Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

Brief *Amici Curiae* Of The National Association Of Regulatory Utility Commissioners, Public Utilities Commission Of The State Of California, State of Minnesota, State Of Oregon And Public Utility Commission Of Oregon, State Of Vermont, Vermont Public Service Board, And Vermont Department Of Public Service, Arizona Corporation Commission, Arkansas Public Service Commission, Connecticut Department Of Public Utility Control, Iowa Utilities Board, Kentucky Public Service Commission, Mississippi Public Service Commission, Montana Public Service Commission, North Carolina Utilities Commission, Virginia State Corporation Commission, Public Service Commission Of Wisconsin, And New England Conference Of Public Utility Commissioners In Support Of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Regulatory Utility Commissioners (NARUC) is a national organization, whose members are the State public service commissions in the fifty States (State commissions), including Petitioner Public Service Commission of the State of New York (NYPSC). NARUC has been recognized by Congress and the Courts as an appropriate representative for State commission interests. NARUC has no parent companies, subsidiaries or affiliates that have issued securities to the public. No publicly traded company owns any equity interest in NARUC.

The Attorneys General of the States of Minnesota, Oregon and Vermont are charged with representing their States in all matters in which their States have an interest, including utility matters, and with representing their State commissions before federal and state courts.

The Public Utilities Commission of the State of California, Arizona Corporation Commission, Arkansas Public Service Commission, Connecticut Department of Public Utility Control, Iowa Utilities Board, Kentucky Public Service Commission, Mississippi Public Service Commission, Montana Public Service Commission, North Carolina Utilities Commission, Public Utility Commission of Oregon, Vermont Department of Public Service, Vermont Public Service Board, Virginia State Corporation

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[1] In accordance with Sup. Ct. R. 37.2(a), the Public Utilities Commission of the State of California (CPUC) has obtained the consent of all parties to the filing of this brief, and the letters of consent are on file with the Clerk of the Court. In accordance with Sup. Ct. R. 37.6, this brief has not been authored in whole or in part by counsel for a party, and no person or entity, other than the CPUC, made a monetary contribution to the preparation and submission of this brief.

Commission and Public Service Commission of Wisconsin are State commissions established under the State Constitutions and/or the laws of their States. Among their duties, the State commissions exercise general regulatory jurisdiction over electric utilities and the provision of retail electric service within their respective States. In utility matters, the State commissions are charged with the protection of the people within their respective States and are authorized to represent them in proceedings before the Federal Energy Regulatory Commission (FERC) and courts reviewing FERC decisions.

The New England Conference of Public Utilities Commissioners (NECPUC) is a not-for-profit corporation, which is funded by the New England States and comprised of all the public utilities commissioners of the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

NARUC, the States of Minnesota, Oregon and Vermont, the State commissions of Arizona, Arkansas, California, Connecticut, Iowa, Kentucky, Mississippi, Montana, North Carolina, Oregon, Vermont, Virginia and Wisconsin, and NECPUC (collectively, "State Commissions") have a vital stake in questions concerning State jurisdiction over retail sales of electric energy within the States and the police powers reserved for the States under the United States Constitution.

Since the early 1900s, the States have had jurisdiction over all retail sales of electric energy within their borders. In Commerce Clause cases, this Court has upheld the States' jurisdiction over such retail sales and service (*see Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)), and Congress explicitly

preserved this State authority in section 201(b) of the Federal Power Act of 1935, 16 U.S.C. § 824(b).

At issue in the present case is regulation of electric generation companies' purchases of electric energy, which is not self-supplied and which is used at the electric generating facilities for their heating, lighting, air-conditioning and office equipment (station power). These purchases are indistinguishable from retail sales service to any other large industrial electric customer for their heating, lighting, air-conditioning and office equipment. As the Petitioners clearly established in their petition, this case involves retail sales of electric energy and cannot be considered "transmission" or "wholesale sales," because the *energy* is consumed at the facilities and it is not available for resale.

Four years ago, this Court affirmed FERC's Order No. 888, which had recognized State jurisdiction over retail sales of electric energy and "carefully avoided assuming such jurisdiction. . . . Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*." *See New York v. FERC*, 535 U.S. 1, 23 (2002). In the present case, FERC asserted jurisdiction over the ultimate sale of the energy.

Amici Curiae State Commissions have a strong interest in this case, not only because it is the first time in history that a Court has upheld a Federal agency's regulation of retail sales of electric energy, but also because of the unprecedented way in which the D.C. Circuit justified FERC's encroachment upon the States' jurisdiction. The D.C. Circuit found the FERC's statutory justification "a bit confusing" and explicitly stated that FERC "has not

clearly articulated why that [transmission] jurisdiction allows it to determine that no sale of any kind – including a retail sale – takes place when the generator takes power from the grid." *See Niagara Mohawk Power Corporation v. FERC*, 452 F.3d 822, 828 (D.C. Cir. 2006) (*Niagara Mohawk*). Without any rational statutory justification for FERC jurisdiction, the D.C. Circuit's decision below rested upon a purported "concession" of jurisdiction by the New York utilities (Petitioners in No. 06-1010) and by the NYPSC (Petitioner in No. 06-1011). *See id.*[2]

If allowed to stand, the D.C. Circuit's decision represents an enormous threat to State sovereignty, because it would be a precedent for how easily a State could lose its reserved police powers if one of its attorneys in a brief or an oral argument makes a statement which the Court interprets or misinterprets to be a concession. Since the D.C. Circuit reviews a disproportionately high number of petitions challenging nearly all of the Federal agencies and involving myriad Federal statutes, this precedent is especially far-reaching and threatens the States in many areas beyond the Federal Power Act. *Amici Curiae* State Commissions will therefore focus on the ramifications of

[2] Although the New York utilities had agreed to FERC's hourly netting accounting policy, they acknowledged that they had no right to give up the State's jurisdiction over retail transactions. Consequently, the D.C. Circuit especially relied upon the oral argument, where the NYPSC's attorney agreed that it would be a valid "policy" judgment to determine that no retail sale occurred under hourly netting accounting. *See id.* Counsel for the NYPSC had not, in fact, conceded FERC *jurisdiction* over hourly netting for retail sales, but had agreed with the *policy* of hourly netting. The NYPSC disagreed, however, with a policy of monthly netting, which, as an accounting measure, would artificially make it appear that retail transactions taking place during certain days of the month did not occur. *See* Pet. App. 112a-115a.

this precedent even assuming *arguendo* that a concession were made, as the D.C. Circuit had erroneously found in its decision.[3]

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the D.C. Circuit's decision below would:

1) for the first time, provide that a State agency has authority to forever waive the police powers of the State by conceding an argument in litigation that it has no authority under State law to concede;

2) utilize the State agency's purported concession to confer jurisdiction upon a Federal agency over a subject matter, which a Federal statute explicitly preserved for State jurisdiction and explicitly precluded the Federal agency from regulating, and in doing so;

3) overall undermine the checks and balances in the United States Constitution by increasing the power of the Executive Branch of the Federal Government at the expense of the sovereign powers of the States and contrary to a law passed by Congress; and

[3] Certain of the *Amici* have jurisdictional disputes with FERC, which are distinguishable on both factual and legal issues from the present case before this Court. However, the potential threat of a State losing jurisdiction, based upon the D.C. Circuit's misinterpretation of a State agency's position as being a concession, is a universal problem for the States.

4) deter cooperative federalism by placing States at risk for agreeing with a Federal policy, which a Court may then treat as a concession of jurisdiction.

SUMMARY OF ARGUMENT IN FAVOR OF GRANTING THE WRIT

The decision of the D.C. Circuit below is based upon the erroneous premise that a State agency or one of its attorneys has the authority to make a concession in litigation, which could forever waive the States' historic police powers over a given subject matter and confer jurisdiction on a Federal agency, when there is no statutory basis for the Federal agency's jurisdiction. However, the reserved powers of the States under the United States Constitution are not so precarious that they can be conceded away. This Court and State Supreme Courts have recognized that a State Legislature cannot waive the State's police powers, and the "reserved powers doctrine" precludes a State from bargaining away its police powers in a contract. In addition, the D.C. Circuit's decision is in direct conflict with Ninth Circuit and Seventh Circuit decisions which hold that State agencies cannot make concessions in litigation, which are contrary to their State law. The D.C. Circuit's decision is also contrary to this Court's finding that the healthy balance between the States and Federal Government in the United States Constitution cannot be undermined by the consent of the State, because the sovereign power of the State is ultimately to protect the people of the State.

In addition, the D.C. Circuit decision threatens the checks and balances within the three branches of the

Federal government by using the State's purported concession to circumvent Congress' explicit savings clause in section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), which preserved State regulation over all retail sales of electric energy and specifically confined FERC's jurisdiction over sales to wholesale sales. This Court has found that Congress provided no exceptions to the bright line between Federal regulation over wholesale sales and State jurisdiction over retail sales of electric energy. Therefore, FERC and the courts may not create exceptions to the law when Congress has provided no exceptions. Moreover, this Court and other cases in the Ninth Circuit and D.C. Circuit have held that a party's consent does not confer jurisdiction upon a Federal agency when Congress has not granted the agency such jurisdiction.

By finding that a State concedes jurisdiction if it agrees with a policy of FERC, the D.C. Circuit decision below threatens the future of cooperative federalism as envisioned by the Framers of the Constitution and by Congress, as set forth in provisions of the Federal Power Act and numerous other Acts. If this decision were allowed to stand, it would deter coordination between the States and Federal Government, because States would not want to risk that such cooperation could be used against them and considered a concession of their jurisdiction.

ARGUMENT IN FAVOR OF GRANTING THE WRIT

I. THE D.C. CIRCUIT'S DECISION SIGNIFICANTLY THREATENS THE RESERVED POWERS OF THE STATES UNDER THE UNITED STATES CONSTITUTION

A. The D.C. Circuit Decision Is Contrary To Decisions Of This Court And State Supreme Courts That State Officials Cannot Waive The State's Police Powers

"[T]he regulation of utilities is one of the most important functions traditionally associated with the police powers of the States." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. at 377. Although this Court held that the Commerce Clause prevented the States' attempts to regulate the wholesale sales of electric energy in interstate commerce, this Court has also affirmed on numerous occasions that the Commerce Clause does not bar the States' regulation of the retail sales. *See id.* at 377-380. Moreover, section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), and its legislative history clearly demonstrate that Congress granted FERC jurisdiction over transmission and the sale of electric energy at wholesale in interstate commerce, but it also retained State jurisdiction over all retail sales of electric energy to the consumer. *See New York v. FERC*, 535 U.S. 1, 20, 23, 28 (2002); *see also Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 523-531 (1945). In section 201(b), Congress drew a bright line between Federal and State jurisdiction. *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 214-216 (1964). "'It cut sharply and cleanly between sales for resale and direct sales for consumptive uses.'" *Id.* at 214-215 (quoting

Panhandle Eastern Pipe Line v. Public Service Comm'n, 332 U.S. 507, 517 (1947)).

Notwithstanding the importance of these police powers and the explicit language of section 201(b) of the Federal Power Act, the D.C. Circuit based its holding against State jurisdiction on the Petitioners' purported concession while, at the same time, the D.C. Circuit had rejected FERC's justification for its assertion of jurisdiction. *See Niagara Mohawk*, 452 F.3d at 828. Nowhere in the decision below does the D.C. Circuit independently find statutory support for FERC jurisdiction without this concession.

Contrary to the premise underlying the D.C. Circuit's decision, a State agency and its attorneys have no authority to make such a concession. Indeed, a State Legislature cannot abridge a subsequent legislature's police powers. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977). Moreover, although there are limits on States under the Contract Clause, U.S. Const., Art. I, § 10, cl. 1, even when the State enters into a contract, the State cannot bargain away its police powers. *See United States Trust Co. v. New Jersey*, 431 U.S. at 23-24. The law is clear that under the "reserved powers doctrine," the State may not give away an essential attribute of its sovereignty. *See U.S. v. Winstar Corporation*, 518 U.S. 839, 888 (1996). "[T]he power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant." *Id.* at 888 n.33 (quoting *Atlantic Coast Line R. Company v. Goldsboro*, 232 U.S. 548, 558 (1914)).

In addition to being contrary to this Court's decisions, the D.C. Circuit's holding is in conflict with State Supreme Court decisions, which also hold that a State may not give away its police powers. *See, e.g., Avco Community Developers, Inc. v. South Coast Regional Com.*, 553 P.2d 546, 556, 17 Cal.3d 785, 800 (1976); *The Weber City Sanitation Commission v. R.G. Grant*, 87 S.E.2d 153, 159, 196 Va. 1140, 1149 (1955). If the State Legislature cannot give away its police powers and the State cannot enter into a binding contract to bargain away its police powers, how can a State agency or one of its attorneys make a concession in oral argument or in a brief, which gives up the police powers?

B. The D.C. Circuit Decision Directly Conflicts With Holdings In Decisions In The Ninth Circuit And Seventh Circuit That State Agencies Have No Authority To Make Concessions In Litigation Which Are Contrary To State Law

When a State agency is in litigation, it has no authority to make concessions which are contrary to State law. As the Ninth Circuit held in *Keith v. Volpe,* 118 F.3d 1386, 1393 (9th Cir. 1997), State officials "could not agree to terms which would exceed their authority and supplant state law." Similarly, the Seventh Circuit has held that State agencies may not enter into consent decrees to "liberate themselves from the statutes enacted by the Legislature that created them." *Kasper v. Board of Election Comm'rs of City of Chicago*, 814 F.2d 332, 341-342 (7th Cir. 1987). The D.C. Circuit's decision below is based upon a purported concession of a State's attorney, and it is therefore in a direct conflict with these Seventh and Ninth

Circuit decisions, which hold that the States' officials cannot consent to matters contrary to State law.

C. The D.C. Circuit Decision Undermines The Balance Of Power Between The States And Federal Government Under The United States Constitution

The federal system established by the United States Constitution preserves the sovereign status of the States and reserves substantial powers for the States. It relies upon a healthy balance of power between the States and Federal Government. *See Gregory v. Ashcroft,* 501 U.S. 452, 457-458 (1991). The "federalist structure of joint sovereign powers preserves to the people numerous advantages. . . . Perhaps the principal benefit of the federalist system is a check on abuses of government power." *Id.* at 458.

In the context of a State's challenge on Tenth Amendment grounds to a Federal statute, which the State's officials had previously supported, this Court held that the constitutional authority of Congress cannot be expanded and State authority narrowed by the "'consent' of state officials." *See New York v. United States*, 505 U.S. 144, 182 (1992). The Court found that just as the checks and balances between the three branches of the Federal Government could not be altered with their consent, the consent of State officials cannot change the constitutional plan and avoid their accountability to the people. *See id.* at 182-183.

For these same reasons, the constitutional authority of the Executive Branch of the Federal Government cannot be expanded and the State authority narrowed due to the purported concession of a State agency on an issue in

litigation. The reserved powers of the States under the Constitution preclude a Court from relying upon the concession, because if the State loses its police powers, it would ultimately be the people of the State who would suffer.

II. THE D.C. CIRCUIT'S DECISION DISRUPTS THE SYSTEM OF CHECKS AND BALANCES BETWEEN THE THREE BRANCHES OF THE FEDERAL GOVERNMENT

The D.C. Circuit decision disrupts the system of checks and balances, not just between the States and the Federal government, but also between the Executive, the Legislative and the Judicial branches of the Federal government. Because Congress may enact legislation in areas traditionally regulated by the States' police powers, it is an area in which Congress does not readily interfere. *Gregory v. Ashcroft,* 501 U.S. at 460-461.

Under section 201(b) of the Federal Power Act, Congress followed the federalist structure and not only preserved the States' police powers over retail electric sales, Congress also "specifically confined" FERC's jurisdiction over the sale of power to the wholesale market. *See New York v. FERC*, 535 U.S. at 23. Thus, FERC has no authority to decide accounting methods, which determine the extent to which retail electric sales take place to generators or any other end user, because jurisdiction over such retail sales was left to the States.

Congress could have treated generation, transmission, distribution and consumption of electric energy as if it were all transmission-related and subject to FERC jurisdiction. However, when Congress enacted the Federal

Power Act, it chose instead to protect the States' jurisdiction and to limit FERC's jurisdiction. *See Connecticut Light & Power Company v. Federal Power Commission*, 324 U.S. at 525-530. As this Court explained:

> Congress is acutely aware of the existence and vitality of state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed. . . . It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.

Id. at 530.

Therefore, with regard to retail electric sales service, Congress consciously chose to retain the advantages of a decentralized government that underlie the United States Constitution, including that it "will be more sensitive to the diverse needs of a heterogeneous society . . . [and] allow more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. at 458.

In sharp contrast to FERC's careful avoidance in its Order No. 888 of assuming jurisdiction over retail sales of electric energy or disrupting the various States' retail service programs (*see New York v. FERC*, 535 U.S. at 23-24), FERC asserted jurisdiction below not only over unbundled *transmission*, but also over the ultimate sale of *energy*, which this Court recognized was subject to the States' jurisdiction. *See id.* at 23. The station power is energy that is sold to the generating facility for its consumption as power for its heating, air-conditioning, lighting

and office equipment. It is therefore not available for resale. As "direct sales for consumptive uses," these retail transactions clearly fall on the States' side of the bright line in the Federal Power Act. " 'No exceptions were made in either category for particular uses, quantities or otherwise.' " *Federal Power Commission v. Southern California Edison Company*, 376 U.S. at 214-215 (quoting *Panhandle Eastern Pipe Line v. Public Service Comm'n*, 332 U.S. at 517).

It is well settled that a Federal agency's jurisdiction is limited to what is authorized by statute. As this Court has held, an administrative " . . . agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986). FERC, "[a]s a federal agency . . . is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.' " *California Independent System Operator Corporation v. Federal Energy Regulatory Commission*, 372 F.3d 395, 398 (D.C. Cir. 2004) (citations omitted).

Although FERC failed to "clearly articulate" the statutory authority under which it was acting, the D.C. Circuit attempted to make up for FERC's failure by using the purported concession of the NYPSC's attorney as justification for the station power exception to the States' retail sales jurisdiction. *See Niagara Mohawk*, 452 F.3d at 828. On a policy basis, the D.C. Circuit further found that FERC could carve out an exception from the term "end user" for generators which purchased station power, even though it was contrary to FERC's Order No. 888. *See Niagara Mohawk*, 452 F.3d at 829. This "flexible approach"

is precisely what this Court held Congress had rejected when it adopted the bright line with no exceptions to State regulation over sales to the ultimate consumers. *Federal Power Commission v. Southern California Edison Company,* 376 U.S. at 214-215. Congress drew a bright line "easily ascertained" to foreclose policy arguments to decide jurisdiction on a case-by-case basis. *See id.* at 215-216. "[C]ourts 'are not at liberty to create an exception where Congress has declined to do so.'" *Freytag v. Commissioner*, 501 U.S. 868, 874 (1991) (citation omitted).

Moreover, the "exception" the D.C. Circuit creates for FERC is itself contrary to the law. As this Court has stated, "Parties, of course, cannot confer jurisdiction; only Congress can do so." *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 652 (1973). Other courts have applied that rule of law directly to FERC. As the Ninth Circuit explained, "[t]he fact is that FERC's regulatory authority is bound by statute, and utilities can neither waive that authority to opt in or out of FERC's jurisdiction." *Bonneville Power Administration et al. v. FERC*, 422 F.3d 908, 924 (9th Cir. 2005). Similarly, " . . . jurisdiction cannot arise from the absence of objection, or even from affirmative agreement. To the contrary, 'as a statutory entity, the Commission cannot acquire jurisdiction merely by agreement of the parties before it.'" *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005) (citation omitted).

The D.C. Circuit's expansion of the Executive Branch's authority at the expense of State jurisdiction undermines all of the checks and balances of the Constitution by utilizing a purported concession by a State agency to defy Congress' clear intent to retain the States' exclusive jurisdiction over retail sales of electricity.

III. THE D.C. CIRCUIT DECISION IS CONTRARY TO COOPERATIVE FEDERALISM AND WILL HAVE A CHILLING EFFECT ON COORDINATION BETWEEN STATE AND FEDERAL AGENCIES

The D.C. Circuit mischaracterized the NYPSC's determination to follow FERC accounting policies on hourly netting as a concession of jurisdiction. This is contrary to the most basic principles of cooperative federalism. The term "cooperative federalism" has been used by this Court to describe laws relying upon coordinated State and Federal efforts within a complementary administrative framework. *New York State Depart. of Social Services v. Dublino,* 413 U.S. 405, 413, 421 (1973). As this Court has held, where a State works in tandem with the Federal government "in the pursuit of common purposes, the case for federal pre-emption becomes a *less* persuasive one." *Id.* (emphasis added).

The D.C. Circuit's use of a State's acquiescence with a policy to confer jurisdiction on a Federal agency, works against the principles of cooperative federalism upon which the Federal Power Act and numerous other statutes depend. It sends a message to the States that they risk losing jurisdiction by taking actions consistent with a Federal agency's practices, regardless of the Federal statutory provisions and explicit savings clauses, such as in section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b).

In matters involving electric regulation, there is a constant need for FERC and State commissions to coordinate. Their consideration of nonjurisdictional matters that are subject to each others' jurisdiction is "commonplace." *See, e.g., Federal Power Commission v. Conway Corp. et al.,*

426 U.S. 271, 280 (1976). In addition to the "savings clause" in section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), other sections make it clear that Congress intended close cooperation between the FERC and States. *See, e.g.,* sections 202 and 209(b), 16 U.S.C. §§ 824a and 824h(b).

Numerous other Acts of Congress also depend upon "cooperative federalism" for their success. For example, sections 1, 3A, 9(b), 11, 13 and 17 of the Natural Gas Act, 15 U.S.C. §§ 717, 717b-1, 717h(b), 717j, 717l, and 717p, necessitate close coordination between FERC and State agencies. "The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it." *Panhandle Eastern Pipe Line v. Public Service Comm'n,* 332 U.S. at 517. However, in light of the D.C. Circuit decision, State commissions will have to be much more cautious about agreeing with FERC on a policy or else this Act, which was intended to help the States, could be used against the States.

The chilling effect of the D.C. Circuit decision has ramifications beyond Congress' energy policies. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) envisions cooperation between the Federal government and the States in addressing the complex and costly problems associated with hazardous waste remediation. *See New Mexico v. GE*, 467 F.3d 1223, 1244 (10th Cir. 2006). Under the logic of the D.C. Circuit's decision below, if a State agrees at first with just the Federal cleanup measures

(i.e., the floor set by CERCLA), it could risk its actions being interpreted as a concession that it has no jurisdiction. Thus, the floor could become its ceiling notwithstanding the clear language in the savings clause, 42 U.S.C. § 9614(a), establishing Congress' intent to allow supplemental State regulations. The same holds true for other Federal statutes, which are based upon cooperative federalism, where Congress provided for States to cooperate with the Federal Government while also preserving State jurisdiction.

If the D.C. Circuit decision is allowed to stand, it could therefore lead to less coordination between States and the Federal Government and undermine the objectives of Congress in many of the laws it has enacted. These laws, like the Constitution itself, reserved powers for the States, and the courts should not be able to thwart the States' rights by using their cooperative efforts against them.

CONCLUSION

For the reasons set forth above and the reasons stated in the petition, *Amici Curiae* State Commissions respectfully urge the Court to grant the writ.

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Respectfully submitted,

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